

CHEN (Migration) [2020] AATA 3468 (11 May 2020)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr DAOFENG CHEN
CASE NUMBER:	1817732
DIBP REFERENCE(S):	BCC2018/639600
MEMBER:	Antoinette Younes
DATE:	11 May 2020
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision to cancel the applicant's Subclass 500 (Student) visa.

Statement made on 11 May 2020 at 10:25am

CATCHWORDS

MIGRATION – cancellation – Student (Temporary) (Class TU) visa – Subclass 500 (Student) – incorrect information in application – bogus document – certificate provided did not match institution's database – claimed that agent responsible for application and bogus document – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 5, 48, 99, 101, 103, 107, 109
Migration Regulations 1994 (Cth), r 2.41; Schedule 4, Public Interest Criterion 4013

CASES

MIAC v Khadgi (2010) 190 FCR 248

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to cancel the applicant's Subclass 500 (Student) visa under s.109(1) of the *Migration Act 1958* (the Act).
2. The delegate cancelled the visa on the basis that the applicant did not comply with secs. 101 and 103 of the Act. The issue in the present case is whether that ground for cancellation is made out, and if so, whether the visa should be cancelled.
3. The applicant appeared by telephone before the Tribunal on 6 May 2020 to give evidence and present arguments.
4. The Tribunal exercised its discretion to hold the hearing by telephone. The hearing was held during the COVID-19 pandemic. The Tribunal determined it was reasonable to hold a hearing by telephone, having regard to the nature of this matter and the individual circumstances of the applicant. The Tribunal also had regard to the Tribunal's objective of providing a mechanism of review that is fair, just, economical and quick, and the delay to the matter if the hearing was not to be conducted by telephone.
5. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
6. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. Section 109(1) of the Act allows the Minister to cancel a visa if the visa holder has failed to comply with ss.101, 102, 103, 104, 105 or 107(2) of the Act. Broadly speaking, these sections require non-citizens to provide correct information in their visa applications and passenger cards, not to provide bogus documents and to notify the Department of any incorrect information of which they become aware and of any relevant changes in circumstances.
8. The exercise of the cancellation power under s.109 of the Act is conditional on the Minister issuing a valid notice to the visa holder under s.107 of the Act, providing particulars of the alleged non-compliance. Where a notice is issued that does not comply with the requirements in s.107, the power to cancel the visa does not arise. Extracts of the Act relevant to this case are attached to this decision.
9. In the present matter, the Tribunal is satisfied that the delegate had reached the necessary state of mind to engage s.107 and that the notice issued under s.107 complied with the statutory requirements.

Was there non-compliance as described in the s.107 notice?

10. The issue before the Tribunal is whether there was non-compliance in the way described in the s.107 notice, being the manner particularised in the notice, and if so, whether the visa should be cancelled. The non-compliance identified and particularised in the s.107 notice was non-compliance with secs. 101 and 103 of the Act.

11. Section 101 provides that:

12. *Visa applications to be correct*

13. *A non-citizen must fill in or complete his or her application form in such a way that:*

14. (a) *all questions on it are answered; and*

15. (b) *no incorrect answers are given or provided.*

16. Section 103 provides that:

17. *Bogus documents not to be given etc.*

18. *A non-citizen must not give, present, [produce]* or provide to an officer, an authorised system, the Minister, the Immigration Assessment Authority, or the Tribunal performing a function or purpose under this Act, a bogus document or cause such a document to be so given, presented, [produced]¹ or provided.*

19. The applicant provided to the Tribunal a copy of the delegate's decision record. In the course of the hearing, the Tribunal discussed the following matters referred to in the delegate's decision:

- On 4 July 2017, the applicant lodged electronically an application for a Student (subclass 500) visa (student visa application).
- On pages 7 to 8 in response to the question in the application form "*Give details of the applicant's highest level of schooling completed outside Australia*", the applicant provided the following details:

20. *Highest level of schooling completed:* *Bachelor degree (including honours) or equivalent*

21. *Course name:* *Bachelor of Business in Economics*

22. *Institution name:* *Auckland University of Technology*

23. *Country of institution:* *NEW ZEALAND*

- On page 14, in response to the declaration "*The applicants declare that they: Have provided complete and correct information in every detail on this form, and on any attachments to it,*" the applicant responded "yes".
- On page 14, in response to the declaration "*The applicants declare that they: Understand that if documents are found to be fraudulent or information to be incorrect after the grant of the visa, the visa may subsequently be cancelled,*" the applicant responded "yes".
- In support of the student visa application, the applicant provided a certificate issued from Auckland University of Technology stating that he had been awarded the degree of Bachelor of Business in Economics, dated 18 April 2017.

¹This wording applies to documents given, presented, produced or provided on or after 4 November 2014: Schedule 7 to Counter Terrorism Legislation Amendment (Foreign Fighters) Act 2014 (No.116, 2014).

- On the basis of the information provided, the applicant was granted the student visa on 25 July 2017.
 - The Department undertook integrity checks regarding the applicant's claimed Bachelor of Business in Economics degree awarded from Auckland University of Technology, dated 18 April 2017. A verification of the certificate of the Bachelor of Business in Economics on the Auckland University of Technology's database did not find any record of the applicant's attendance at that university. The copy of the certificate provided by the applicant has an identical tear in the seal when compared with other certificates found to be fraudulent, indicating alterations of the same forged document.
24. On 3 May 2018, the Department sent to the applicant a Notice of Intention to Consider Cancellation (NOITCC) to which the applicant responded on 23 May 2018. In his response, he noted:
- There has not been non-compliance with secs. 101 and 103 of the Act. He did not provide incorrect information or a bogus document. One of his friends told him that he could assist him to contact a migration agent in relation to the student visa application. He provided his friend with the relevant documents and his friend told him that the migration agent had confirmed that the information and document provided are sufficient to be granted the student visa.
 - He did not create or alter the certificate from Auckland University of Technology. He had no idea of the incorrect information or the bogus document provided to the Department until he received the NOITCC. He asked his friend for the reasons the agent "*made the fake document and provided it to Department of Home Affairs*". His friend did not give him the details of the agent and due to his limited knowledge of migration law, he did not know how to protect himself against the migration agent.
 - He did not intend or have the ability to create or alter any document. He is innocent and he is a genuine student with a high attendance rate and academic performance. He would like to continue his studies at CBC College and return to China to start a career.
25. In the course of the hearing, the Tribunal invited the applicant to comment on the information contained in the delegate's decision record to which the applicant stated that he had "*nothing to say*". The Tribunal asked the applicant if he had any details relating to the migration agent and the applicant said he does not know the agent's name.
26. On the evidence, the Tribunal finds that contrary to the information provided by the applicant in the student visa application in response to the relevant questions on pages 7, 8 and 14, the applicant did not hold a Bachelor of Business in Economics degree awarded from Auckland University of Technology. Accordingly, the Tribunal finds that the applicant provided incorrect answers as contemplated by s.101 of the Act.
27. On the evidence, the Tribunal is satisfied that the Bachelor of Business in Economics degree from Auckland University of Technology is not a genuine document. The Tribunal finds that it is a bogus document as defined in s.5(1) of the Act, namely:
28. *In this Act, unless the contrary intention appears:*
29. **bogus document**, in relation to a person, means a document that the Minister reasonably suspects is a document that:

30. (a) *purports to have been, but was not, issued in respect of the person; or*
31. (b) *is counterfeit or has been altered by a person who does not have authority to do so; or*
32. (c) *was obtained because of a false or misleading statement, whether or not made knowingly.*

33. The Tribunal is satisfied that the Bachelor of Business in Economics degree from Auckland University of Technology is a bogus document in that it is counterfeit or has been altered by a person who has no authority to do so, and it was not issued in respect of the applicant.
34. For those reasons, the Tribunal finds that there was non-compliance by the applicant in the way described in the s.107 notice.

Should the visa be cancelled?

35. As the Tribunal has decided that there was non-compliance in the way described in the notice given to the applicant under s.107 of the Act, it is necessary to consider whether the visa should be cancelled pursuant to s.109(1).
36. Cancellation in this context is discretionary, as there are no mandatory cancellation circumstances prescribed under s.109(2).
37. In exercising this power, the Tribunal must consider the applicant's response (if any) to the s.107 notice about the non-compliance, and have regard to any prescribed circumstances: s.109(1)(b) and (c).
38. The prescribed circumstances are set out in r.2.41 of the Regulations. Briefly, they are:

• the correct information

39. The correct information is that contrary to the information provided by the applicant, the applicant does not hold a Bachelor of Business in Economics degree awarded from Auckland University of Technology and that the document is not a genuine document.
40. The applicant has claimed that he had no knowledge that incorrect information and a bogus document had been provided in the student visa application. He claimed that an agent lodged the application and the Tribunal accepts that the application was completed by an agent.
41. The Tribunal has serious doubts about the applicant's claims that he was not responsible for or had knowledge of the provision of the incorrect information. In any event s.99 of the Act is enlivened, irrespective of whether the applicant knew.
42. Section 99 provides that:

43. *Information is answer*

44. *Any information that a non-citizen gives or provides, causes to be given or provided, or that is given or provided on his or her behalf, to the Minister, an officer, an authorised system, a person or the Tribunal, or the Immigration Assessment authority, reviewing a decision under this Act in relation to the non-citizen's application for a visa is taken for the purposes of section 100, paragraphs 101(b) and 102(b) and sections 104 and 105 to be an answer to a question in the non-citizen's application form, whether the information is given or provided orally or in writing and whether at an interview or otherwise.*

45. The Bachelor of Business in Economics degree from Auckland University of Technology is not a genuine document. The Tribunal has found that it is a bogus document as defined in s.5(1) of the Act; it is counterfeit or has been altered by a person who has no authority to do so, and it was not issued in respect of the applicant.
46. The provision of correct information plays a significant role in maintaining integrity and proper standards in the visa program. It is a legislative intention that correct information is provided in visa applications and there are intended consequences such as potential visa cancellation in case of non-compliance.
47. The Tribunal considers the provision of incorrect information to be serious. The Tribunal gives this aspect significant weight in favour of cancellation.

- ***the content of the genuine document (if any)***

48. The Bachelor of Business in Economics degree from Auckland University of Technology is a bogus document as defined in s.5(1) of the Act and the Tribunal gives this aspect significant weight in favour of cancellation.
49. There is no 'genuine' document relevant to the Tribunal's consideration. The Tribunal gives this aspect neutral weight.

- ***whether the decision to grant a visa or immigration clear the visa holder was based, wholly or partly, on incorrect information or a bogus document***

50. The Tribunal is satisfied that the decision to grant the student visa was based, wholly or partly on the information that the applicant had completed the Bachelor of Business in Economics degree from Auckland University of Technology and the bogus certificate provided.
51. The Tribunal gives this aspect significant weight in favour of cancellation.

- ***the circumstances in which the non-compliance occurred***

52. The non-compliance occurred when incorrect information and a bogus document were provided in the student visa application lodged on 4 July 2017.
53. The Tribunal is mindful that the applicant has claimed that he was not aware that incorrect information and a bogus document had been provided. Even if the Tribunal were to accept the applicant's contentions, under s.99, he is responsible for the provision of the information.
54. The Tribunal gives this aspect significant weight in favour of cancellation.

- ***the present circumstances of the visa holder***

55. The applicant gave evidence that he has no family in Australia.
56. The Tribunal asked the applicant if he has completed any course in Australia and he confirmed that he has not completed any course. The Tribunal asked the applicant for his reasons for remaining in Australia and he stated that he likes being in Australia because Australia is "*good*". The applicant gave evidence that he has been working in casual jobs, the details of which he did not provide to the Tribunal.

57. The Tribunal is mindful that in response to the NOITCC, the applicant provided evidence of satisfactory attendance at Choice Business College but he confirmed that he has not completed any courses.

58. The Tribunal does not consider the applicant's circumstances as warranting the favourable exercise of discretion.

59. The Tribunal gives this aspect weight in favour of cancellation.

- ***the subsequent behaviour of the visa holder concerning his or her obligations under Subdivision C of Division 3 of Part 2 of the Act***

60. The applicant responded to the NOITCC and the Tribunal gives this aspect weight in the applicant's favour.

- ***any other instances of non-compliance by the visa holder known to the Minister***

61. There is no evidence of other instances of non-compliance.

62. The Tribunal gives this aspect neutral weight.

- ***the time that has elapsed since the non-compliance***

63. The non-compliance occurred on 4 July 2017 on lodgement of the student visa application. The Tribunal does not consider this timeframe to be significant warranting favourable consideration.

64. the Tribunal gives this aspect neutral weight.

- ***any breaches of the law since the non-compliance and the seriousness of those breaches***

65. There is no evidence of any breaches of the law.

66. The Tribunal gives this aspect neutral weight.

- ***any contribution made by the holder to the community.***

67. The applicant has not made submissions relating to this aspect.

68. The Tribunal gives this aspect neutral weight.

69. While the above factors must be considered, they do not represent an exhaustive statement of the circumstances that might properly be considered to be relevant in any given case: *MIAC v Khadgi* (2010) 190 FCR 248. The Tribunal may also have regard to lawful government policy. The relevant policy is set out in the Department's Procedural Advice Manual) PAM3 'General visa cancellation powers', which refers to matters such as the consequences of cancelling the visa, international obligations and any other relevant matters.

- ***whether there are mandatory legal consequences, such as whether cancellation would result in the visa holder being unlawful and liable to detention, or whether indefinite detention is a possible consequence of cancellation, or whether there are provisions in the Act which prevent the person from making a valid visa application without the Minister's intervention***

70. The cancellation of the applicant's visa could result in the applicant's detention and potential removal from Australia. He could however make travel arrangements and voluntarily depart Australia. The applicant would also be impacted by s.48 of the Act which means that he may face difficulties in applying in Australia for any further visas.
71. The applicant could apply for an Australian visa offshore and any such application would be assessed on its merits, including any application of Public Interest Criterion 4013 (PIC 4013). The Tribunal considers potential detention and removal from Australia as well as the s.48 bar and PIC 4013 to be intended legislative consequences.
72. The Tribunal gives this aspect limited weight in the applicant's favour.
- ***whether there would be consequential cancellations under s.140***
73. There is no evidence of any consequential cancellation.
74. The Tribunal gives this aspect weight in favour of cancellation.
- ***whether any international obligations would be breached as a result of the cancellation, such as non-refoulement obligations, family unity principles or the obligation to consider the best interests of the child.***
75. There is no information before the Tribunal to suggest that any children would be impacted or that Australia would be in breach of any of its non-refoulement obligations in case of cancellation.
76. The Tribunal gives this aspect neutral weight.
- ***any other relevant matters, including the degree of hardship that may be caused to the visa holder and any family members.***
77. The applicant gave evidence that he has no family in Australia. The applicant came to Australia to study and he did, although he has not completed any courses. He provided evidence from Choice Business College of good attendance rate. He gave evidence that he works casually in Australia. The Tribunal is mindful that the cancellation of the visa would cause a degree of financial, psychological, and emotional hardship to the applicant. The Tribunal gives this consideration weight in the applicant's favour.
78. The Tribunal is not aware of any other relevant matters.

79. **CONCLUDING REMARKS**

80. The Tribunal has carefully considered the material before it individually and cumulatively. The Tribunal is satisfied that the totality of the considerations weighs heavily in favour of cancellation.
81. The Tribunal has decided that there was non-compliance by the applicant in the way described in the notice given under s.107 of the Act. Having regard to all the relevant circumstances, as discussed above, the Tribunal concludes that the visa should be cancelled.

DECISION

82. The Tribunal affirms the decision to cancel the applicant's Subclass 500 (Student) visa.

Antoinette Younes
Senior Member

ATTACHMENT – *Migration Act 1958* (extracts)

5 Interpretation

- (1) In this Act, unless the contrary intention appears:
- bogus document**, in relation to a person, means a document that the Minister reasonably suspects is a document that:
- (a) purports to have been, but was not, issued in respect of the person; or
 - (b) is counterfeit or has been altered by a person who does not have authority to do so; or
 - (c) was obtained because of a false or misleading statement, whether or not made knowingly.

97 Interpretation

In this Subdivision:

application form, in relation to a non-citizen, means a form on which a non-citizen applies for a visa, being a form that regulations made for the purposes of section 46 allow to be used for making the application.

passenger card has the meaning given by subsection 506(2) and, for the purposes of section 115, includes any document provided for by regulations under paragraph 504(1)(c).

Note: **Bogus document** is defined in subsection 5(1).

98 Completion of visa application

A non-citizen who does not fill in his or her application form or passenger card is taken to do so if he or she causes it to be filled in or if it is otherwise filled in on his or her behalf.

99 Information is answer

Any information that a non-citizen gives or provides, causes to be given or provided, or that is given or provided on his or her behalf, to the Minister, an officer, an authorised system, a person or the Tribunal, or the Immigration Assessment authority, reviewing a decision under this Act in relation to the non-citizen's application for a visa is taken for the purposes of section 100, paragraphs 101(b) and 102(b) and sections 104 and 105 to be an answer to a question in the non-citizen's application form, whether the information is given or provided orally or in writing and whether at an interview or otherwise.

100 Incorrect answers

For the purposes of this Subdivision, an answer to a question is incorrect even though the person who gave or provided the answer, or caused the answer to be given or provided, did not know that it was incorrect.

101 Visa applications to be correct

A non-citizen must fill in or complete his or her application form in such a way that:

- (a) all questions on it are answered; and
- (b) no incorrect answers are given or provided.

103 Bogus documents not to be given etc.

A non-citizen must not give, present, [produce]* or provide to an officer, an authorised system, the Minister, the Immigration Assessment Authority, or the Tribunal performing a function or purpose under this Act, a bogus document or cause such a document to be so given, presented, [produced]² or provided.

107 Notice of incorrect applications

- (1) If the Minister considers that the holder of a visa who has been immigration cleared (whether or not because of that visa) did not comply with section 101, 102, 103, 104 or 105 or with subsection (2) in a response to a notice under this section, the Minister may give the holder a notice:
- (a) giving particulars of the possible non-compliance; and
 - (b) stating that, within a period stated in the notice as mentioned in subsection (1A), the holder may give the Minister a written response to the notice that:
 - (i) if the holder disputes that there was non-compliance:
 - (A) shows that there was compliance; and

^{*}This wording applies to documents given, presented, produced or provided on or after 4 November 2014: Schedule 7 to *Counter Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (No.116, 2014).

- (B) in case the Minister decides under section 108 that, in spite of the statement under sub-subparagraph (A), there was non-compliance—shows cause why the visa should not be cancelled; or
 - (ii) if the holder accepts that there was non-compliance:
 - (A) give reasons for the non-compliance; and
 - (B) shows cause why the visa should not be cancelled; and
- (c) stating that the Minister will consider cancelling the visa:
 - (i) if the holder gives the Minister oral or written notice, within the period stated as mentioned in subsection (1A), that he or she will not give a written response—when that notice is given; or
 - (ii) if the holder gives the Minister a written response within that period—when the response is given; or
 - (iii) otherwise—at the end of that period; and
- (d) setting out the effect of sections 108, 109, 111 and 112; and
- (e) informing the holder that the holder's obligations under section 104 or 105 are not affected by the notice under this section; and
- (f) requiring the holder:
 - (i) to tell the Minister the address at which the holder is living; and
 - (ii) if the holder changes that address before the Minister notifies the holder of the Minister's decision on whether there was non-compliance by the holder—to tell the Minister the changed address.
- (1A) The period to be stated in the notice under subsection (1) must be:
 - (a) in respect of the holder of a temporary visa—the period prescribed by the regulations or, if no period is prescribed, a reasonable period; or
 - (b) otherwise—14 days.
- (1B) Regulations prescribing a period for the purposes of paragraph (1A)(a) may prescribe different periods and state when a particular period is to apply, which, without limiting the generality of the power, may be to:
 - (a) visas of a stated class; or
 - (b) visa holders in stated circumstances; or
 - (c) visa holders in a stated class of people (who may be visa holders in a particular place); or
 - (d) visa holders in a stated class of people (who may be visa holders in a particular place) in stated circumstances.
- (2) If the visa holder responds to the notice, he or she must do so without making any incorrect statement.

108 Decision about non-compliance

The Minister is to:

- (a) consider any response given by a visa holder in the way required by paragraph 107(1)(b); and
- (b) decide whether there was non-compliance by the visa holder in the way described in the notice.

109 Cancellation of visa if information incorrect

- (1) The Minister, after:
 - (a) deciding under section 108 that there was non-compliance by the holder of a visa; and
 - (b) considering any response to the notice about the non-compliance given in a way required by paragraph 107(1)(b); and
 - (c) having regard to any prescribed circumstances;
 may cancel the visa.
- (2) If the Minister may cancel a visa under subsection (1), the Minister must do so if there exist circumstances declared by the regulations to be circumstances in which a visa must be cancelled.